United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-5029

United States Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter

of

INTERSTATE STORES, INC. formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,

Debtor-Appellees.

DOMINICK'S FINER FOODS, INC.,

Appellant,

and

JOHN E. HANCOCK and AMF INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

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Preliminary Statement

Critical points -- dispositive of this appeal and requiring reversal -- have not been rebutted by any of the briefs submitted by the Appellees.

First, Dominick's is entitled to the property. Dominick's bought it "fair and square" at a sale conducted in open court for a price which was higher than anyone had offered to pay in over two years of intensive efforts to sell, and higher than even Hancock was then prepared to pay. The Trustees were "delighted" with the price and the terms (Hancock Brief, p.2). Dominick's right to the property was taken away two months later only because the court below, sitting as an appellate court, improperly substituted its own findings of fact as to Hancock's trumped up claims of "surprise" and "confusion" for findings of the trial judge that had been based on an evaluation of witnesses' credibility; and the court below improperly usurped the discretion of the Bankruptcy Judge to determine matters of notice in a proceeding involving 17,000 creditors and stockholders. Even the Trustees had supported in its entirety the ruling of the Bankruptcy Judge (523a-525a), although they now have changed their colors and their arguments. Such turns of position and the Appellees' stress on the refuge of mootness only serve to emphasize that Dominick's was the court-approved buyer for an adequate price, and Dominick's is entitled to the property.

Second, legal gymnastics may not give Doyle (Hancock's assignee and principal) any better title than the defeasible title held by the Trustees on September 10. Bankruptcy rules and cases concerning stays are not devices to cure an infirm title. The state of title was what everyone understood Judge Cannella to have described, i.e., a title subject to Dominick's vendee's rights upon a reversal by this Court. Doyle knew this. The language of Judge Cannella's August 16 order was clear. With open eyes and after due warning, the Trustees "sold" property rights which might be divested upon a reversal by this Court. That was all Doyle "purchased."

Third, crucial and well-established rules concerning finality of judicial sales have been severely weakened by the decision below which vacated a confirmed sale even though there was no credible factual support for the ruling, and even though the fault found with the notice of hearing was later proved to be without any merit. Despite the increased notice and expensive advertising required by the remand order, no one else showed up to bid the second time around other than Dominick's and the person for whom Hancock had always been acting -- the same people who were in court the first time.

In this Reply Brief, Dominick's will limit itself to three matters which we believe to be of substantial interest to the Court:

1. If the Court reverses, the Debtor's estate need not lose one cent. A reversal will be in accord with this Court's well-established precedent.

2. This appeal is not moot. Appellees have made desperate arguments evidenced, for example, by the misrepresentation that Doyle is a "stranger" to this proceeding. The rebuttal affidavit to be submitted, with leave of the Court, on the motion to dismiss for mootness shows that Doyle is, in fact, Hancock's principal, and that both have always been acting for a company in which Doyle owns a substantial interest and of which he is president.

3. Crucial matters of judicial policy and administration involving the importance of maintaining the integrity and finality of judicial sales compel reinstatement of the sale to Dominick's.

POINT I. THIS COURT CAN GRANT DOMINICK'S REQUESTED RELIEF WITHOUT COSTING THE ESTATE A PENNY BY SIMPLY FOLLOWING ITS OWN PRECEDENT.

The Appellees' diversionary tactic is to stress the absurd notion that a reversal of the District Court means that the Debtor's estate loses $525,000.* This Court need only look to its own well-established law, recognized by other circuits, to dispel any fear of loss to the estate, quite apart from the irrelevance of any such loss.** In re Frasin, 201 F. 343 (2d Cir. 1912); In re Miltones, Inc., 286 F. 806, 808-809 (2d Cir. 1922); In re Dunham, 36 F.2d 282 (S.D.N.Y. 1929); see also In re Childs Co., 163 F.2d 379, 381 (2d Cir. 1947) (dictum); cf. In re McCann, 250 F. 1006 (N.D.N.Y. 1918); accord, Hagan v. Gardner, 283 F.2d 643, 646 (9th Cir. 1960); John Schaap & Sons Drug Co. v. Rone, 19 F.2d 517, 518 (8th Cir. 1927).

In re Frasin, supra, is strikingly similar to the case at bar. There, the trustee sold a leasehold interest to Zahm. The sale was pursuant to an order of the district court, reversing an order of the referee, and authorizing the sale.***

*Dominick's has previously dispelled Hancock's related ploy that Doyle's investment in the property pending the hearing of the appeal warrants dismissal of the appeal. Dominick's Memorandum, Point I C; see also In re Frazin & Oppenheim, 181 F. 307, 312 (2d Cir. 1910).

**Dominick's has previously demonstrated that the difference between the May 17 and September 10 purchase prices is irrelevant to a determination of the merits of this appeal. See infra at 27.

***The district court explicitly stated that the trustee could "give a perfect title . . . and that the purchaser can take the premises on the terms of the lease . . . . " In re Frazin & Oppenheim, 174 F. 713, 716 (S.D.N.Y. 1909). Note that the bankrupt is at times referred to in the case captions as "Frasin", and at other times as "Frazin".

Prior to Zahm's purchase, an appeal had been taken from the district court's order of sale. Zahm consummated the purchase before the appeal was decided and paid $5,150, a great deal of money in 1910. Thereafter, this Court reversed the district court, see In re Frazin, 183 F. 28 (2d Cir. 1910), holding that the trustee had nothing to sell because he had mistakenly failed to affirm the lease, with the result that the landlord was entitled to possession, not the purchaser. Zahm's assignee thereupon petitioned for a refund of the purchase price. The referee denied the petition, and the district court affirmed. This Court also affirmed and refused to permit recovery of the purchase price, even though, as it turned out, Zahm had purchased nothing. This Court said:

> "[T]he bidder at the sale . . . was fully informed when he purchased the trustee's interest in the lease of all the facts relating thereto. He was not deceived, he knew what he was buying and was clearly advised of the character of the title. He was expressly informed that the trustee was selling only such title as he possessed, he knew that the trustee's title was in litigation and that an appeal had been taken from the order under which the sale was proceeding and that the order might be reversed. He knew, therefore, that he who bid at the sale would do so at his peril and without recourse in the event of the reversal of the order of the District Court. It was expressly stated at the sale that:
>
> > "'The trustee assumes no personal responsibility and does not warrant the lease or its salability [sic].'
>
> "It would be difficult to imagine a statement which could convey to the bidders in plainer language that the trustee sold only such interest as he possessed. This interest might be valuable or it might be worthless and he who purchased it did so at his peril and without recourse. No

> material fact was withheld, the entire situation was stated, no one could have been misled. To permit a purchaser, who thus speculates upon the value of the property bid in by him, to recover the price paid because subsequent events show that the interest purchased was less valuable than he supposed it to be, seems to us most inequitable." 201 F. at 343-344 (emphasis added).

This Court concluded that Zahm could not reform his bargain: "The buyer knew exactly what he was purchasing." 201 F. at 344. The buyer took the risk of the trustee's having no authority to sell.

The Frasin case is squarely applicable here. There, the sale was to Zahm pursuant to a district court order which reversed the referee. Here, Doyle purchased at the September 10 "sale" held pursuant to Judge Cannella's order of reversal and remand. There, as here, the party asserting the paramount interest obtained no stay of the sale held pursuant to the district court order. There, as here, an appeal was taken from the district court order authorizing the trustee to sell. There, as here, the purchaser "knew that the trustee's title was in litigation and that an appeal had been taken . . . . " 201 F. at 343. "He knew, therefore, that he . . . bid . . . at his peril . . . and without recourse in the event of the reversal of the District Court." Id. In Frasin, as here, the purchaser knew that he had purchased no more than the trustee could sell. Indeed, the contract between the Trustees and Doyle said this.* What is more, Doyle knew that the District

*See Agreement at ¶5.3: "Buyer at any time may accept such title as Seller can convey, without reduction of the purchase price or any credit or allowance on account thereof or any claim against the Seller. The acceptance of the Closing documents by Buyer shall be deemed to be full performance of, and discharge of, every agreement and obligation on the part of Seller to be performed hereunder . . . . " (554a).

Court had explicitly stated that the sale to Dominick's might be reinstated if there were a reversal. Doyle specifically agreed at the September 10 hearing that he would not "assert as a cloud on the title, and [would] accept the title to be marketable, notwithstanding the present status of" the appeal at bar (630a).

In Frasin, when the district court order was reversed the purchaser was not permitted to recover his money. The result need be no different here.*

Frasin, therefore, serves to expose the Appellees' incorrect theory that reinstatement of the sale to Dominick's requires a refund of the monies paid on the September 10 bid. Doyle paid for the Trustees' title with all infirmities, including any arising from a reversal on the pending appeal. He thereby obtained only the right to possession and the use of the property for a period commencing with the date of Closing and possibly terminating upon an order reversing the district court and reinstating the sale to Dominick's. Only if there were an affirmance by this Court would the cloud on title -- Dominick's vendee rights -- be lifted.

Although the holding of Frasin means that the Trustees at bar may well be entitled to retain the $1.21 million paid by Doyle and may in addition obtain the $685,000 purchase price from Dominick's, this Court need not now resolve the matter. It will be for the Bankruptcy Judge in an appropriate proceeding to consider

*The district court also held that "the doctrine of caveat emptor is clearly applicable," 201 F. at 344, a holding consistent with the universally well-established law. See generally 4A Collier, Bankruptcy ¶70.98 [18] at 1202 (14th ed. 1976) stating that a purchaser at a judicial sale "may not after discovery of a defect covered by the 'caveat emptor' principle refuse payment of the purchase price or claim abatement."; e.g., cases cited supra at 4.

the claims of Doyle, if any, and the position of the Trustees.

The issue on this appeal is simply whether the order of remand and vacatur of sale to Dominick's should be reversed and whether there should be enforcement of Dominick's right to the property. This Court may restrict its ruling, as it did in the Frazin decision, where this Court reinstated the lessor's interest and did not consider the consequence, if any, upon the estate and Zahm. In re Frazin, 183 F. 28 (2d Cir. 1910).

Thus, in reversing the order of the District Court, this Court will be merely following its precedent in Frazin, supra, where the reversal took place even though Zahm, like Doyle, had consummated his purchase from the trustee.

This Court will also be following its decision In re Burr Mfg. & Supply Co., 217 F. 16 (2d Cir. 1914) which stands squarely for the proposition that a prior order of sale may be reinstated even though a sale to another has been consummated. In that case, the bankruptcy court confirmed a sale to a Porter for $6,250 in August 1913. The sale was thereafter set aside, the court directed a new sale, and the property was sold to Schomaker for $8,500. The deed was delivered in January 1914. Porter appealed to this Court, and in August 1914, a full eight months after the deed was delivered, this Court reversed the order vacating the sale to Porter and confirming the sale to Schomaker, and reinstated the order of sale to Porter. This Court remanded "to take further proceedings not inconsistent with the views expressed in this opinion." 217 F. at 22. Neither the passage of

time nor the consummation of the second sale had mooted the first purchaser's appeal. No stay had been obtained pending the appeal.

Frasin and Burr are the law of this Circuit. The cases have been cited numerous times. They demonstrate that this Court has rejected arguments grounded in emotion and has ruled as the law requires. There is no reason why Frasin and Burr should not control here.

POINT II. THE SEPTEMBER 10 "SALE" DOES NOT MOOT THIS APPEAL.

This appeal is alive and well, and the Appellees know it. If it were otherwise, Appellees would not have made the strained arguments: (1) that Doyle is a "stranger", when the facts are otherwise; (2) that Dominick's option to seek a stay somehow ripened into a requirement for a stay; (3) that the District Court had "lost" jurisdiction and was without power to issue the August 16 ruling; and (4) that Doyle obtained unqualified title at the September 10 sale.

These arguments have no merit. This Court has the power to grant relief, and that ends the mootness argument.

A. Doyle and the Property Are Within This Court's Jurisdiction; Doyle Is Not A Stranger.

The Appellees have not attempted to deal with the case law (of which Bankruptcy Rule 805 is declarative) that this Court has the clear power, even in the absence of a stay, to reinstate the sale to Dominick's if it has effective jurisdiction over the purchaser of the property. See Dominick's Memorandum, Points I B, I D, II C. Instead, Appellees assert that Doyle is a "third party" and "stranger" because he became Hancock's "assignee shortly preceding the September 10, 1976 sale . . . . " (Hancock's Brief, p.16). Thus, this argument goes, Doyle was only a party to the September 10 "sale" but was never before the District Court.

Hancock's description of an alleged short-lived relationship with Doyle is at best a half-truth, and less kindly,

patently misleading. Recently uncovered facts persuasively indicate that Hancock has at all material times (i.e., from May 17 through September 10) acted for Doyle. A title policy from the Chicago Title Company in the possession of Hancock prior to the May 17 sale and used by Hancock in his negotiations with the Trustees' attorneys had been issued in the name of Doyle as proposed insured.* Doyle himself had at all times been acting for McDade & Company, Inc. ("McDade"), of which he is president and one of the two major stockholders. McDade at this time is operating a catalogue discount store at the premises -- the very store obviously referred to by Hancock's lawyer on August 13 when he wrote to Judge Cannella: "that Mr. Hancock intended that this property, which is a retail store, be opened and available for use in time for this year's Christmas season" (532a). These facts are set forth in the rebuttal affidavit to be submitted, with leave of the Court, on the mootness motion. Of course, Doyle is no "stranger" to this appeal. The real party in interest -- Doyle, McDade, or the principals of McDade -- are in this Court's jurisdiction because Hancock, who acts as agent and nominee for the real party in interest, was before the Court below and is before this Court.

The Appellees next argue that the appeal must be dismissed because the District Court had no jurisdiction to enter the August 16 order which stated that upon a reversal by this Court the sale to Dominick's could be reinstated. The argument

*In light of this fact, Hancock's statement that he "caused the Chicago Title Company to do a title search" smacks of serious and misleading omissions (Hancock's Brief, p.2; see also 176a).

is frivolous.* When the District Court denied the stay it clearly had the jurisdiction to do so and it was judicially prudent to state the reasons. Fed. R. App. P. 8(a). See Virginia R. Co. v. United States, 272 U.S. 658, 675 (1926); Metalock Repair Service, Inc. v. Harman, 258 F.2d 809, 815 (6th Cir. 1958); see generally 9 Moore, Federal Practice ¶208.07 at 1424 (2d ed. 1975). The ruling served to clarify the prior order of reversal by making clear that title transferred by the Trustees pursuant to a new sale would be subject to defeasance upon this Court's reversal of the District Court. Inherent in the power to grant a stay is the power to grant any other less drastic relief that will guarantee that the parties' rights will be preserved upon the appeal. The order was also within the rule that the District Court retains jurisdiction "with respect to . . . matters . . . in aid of the appeal." Id. 9 Moore, Federal Practice §203.11 at 734. As stated in Moore:

> "In general, the district court should have full authority to take any steps during the pendency of the appeal that will assist the court of appeals in the determination of the appeal." 9 Moore, Federal Practice, §203.11 at 734, n.2.

Certainly, an order which makes clear that this Court has continuing jurisdiction over the property involved in the appeal and that effective relief may be granted is an order in aid of the appeal.**

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*The Appellees also mischaracterize the Dominick's August 16 motion as ex parte. The Appellees know full well that both Mr. Kruger for Hancock, and Mr. Yassky for the Trustees were notified by telephone of Dominick's motion. Mr. Yassky indicated that he would not appear.

**Dominick's does not argue, as erroneously suggested, that Hancock was required to appeal the August 16 ruling (Hancock's Brief, pp.24-27), but only that the ruling put Hancock, and all other potential bidders at the new sale, on notice that they were purchasing only the Trustees' title subject to this Court's determination. E.g., In re Frasin, 201 F. 343 (2d Cir. 1912).

B. Doyle Purchased No More Than The Trustees Could Sell; Rule 805 Is Not Applicable.

The Appellees have both missed and confused the simple, yet central fact, that this appeal is not analogous to, or in any way similar to, an appeal from an order of sale. This is an appeal from an order vacating and setting aside a confirmed sale. Thus, the case at bar is completely different from the cases which Rule 805 is intended to codify (discussed in Dominick's Memorandum, pp.15-18).* In contrast, the case here is similar to one where a vendor is in litigation over his title with "A", a contract vendee. During the pendency of the litigation, the vendor proceeds to sell to purchaser "B", who has notice of "A"'s claim. "B" does not obtain clear title to the property. He takes title subject to such rights of "A" as may be established in the litigation. In re Frasin, 201 F. 343 (2d Cir. 1912); cf. Pollack v. Viele, 298 N.Y. 670, 82 N.E. 2d 404 (1948).

The controlling rule of bankruptcy sales ignored by the Appellees is that a purchaser may buy only what a trustee has to

*Thus Hancock confusingly asserts: "No one is more likely to be a party to an appeal arising from a judicial sale of property than the purchaser whom [the] Bankruptcy Rules . . . seek to protect' (Hancock's Brief, p.32, emphasis added). Similarly, the Trustees create a straw man by arguing that Dominick's position is intended to create an "'exception'" to Rule 805 as "the most likely party to an appeal concerning the judicial sale of property is the purchaser", citing authority involving appeals from referees' orders of sale (Trustees' Brief, p. 24).

Of course there is no "exception" here because there is no appeal here from an order of sale; at bar is an appeal from an order setting aside a sale. A subsequent purchaser is not usually a "likely party" to an appeal from such an order, although he is a party to the appeal at bar. The case law cited by the Trustees is simply not applicable. Compare, In re Frasin, 201 F. 343 (2d Cir. 1912).

sell, see generally 4A Collier, Bankruptcy ¶70.98[18], and that this determination depends on "the terms of the sale as ordered or agreed upon." Id. at 1198. "In the absence of specific warranty clauses the bankruptcy sale is governed by the rule 'caveat emptor'." Id. at 1201. Thus, no sale may moot the appeal if the purchaser takes subject to the contingent rights of a third party. This essential and governing principle has been recognized by this Court in In re Burr Mfg. & Supply Co., 217 F. 16 (2d Cir. 1914) and the Frasin cases, supra, and is reflected in the contract of sale between the Trustees and Doyle.

The Appellees, however, have continued to assume that Rule 805 somehow supersedes this essential rule and thereby cures the infirmity in the Trustees' title. They also insist that the record nowhere indicates that Doyle received only a defeasible title (Hancock's Brief, pp.18, 21; Hancock's Reply Brief on the Motion to Dismiss, p.6). Dominick's has demonstrated otherwise (Dominick's Memorandum, pp.6-7).

The Appellees have completely ignored the basic distinction between an appeal to a district court from a referee's order of sale and an appeal to a circuit court from a district court's order of vacatur of sale. The Trustees attempt to sweep the distinction under the rug in a footnote which baldly asserts that the distinction is "technical". See Note at 25-26 of Trustees' Brief. The distinction, however, makes clear that Rule 805 is not involved in this appeal. That Rule deals expressly with an appeal to a district court from an order of confirmation of sale. To argue that the Rule applies at bar to an order of reversal by the

District Court is to advance theories which find no basis in the language and policy of the Rule, the commentary thereon, or in the case law. See Dominick's Memorandum, Point II.

The basic error of the Appellees' arguments is illustrated by In re Frasin, 201 F. 343 (2d Cir. 1912) (as discussed supra at 5-8), and In re Burr Mfg. & Supply Co., 217 F. 16 (2d Cir. 1914) (discussed supra at 8-9), where this Court twice recognized, in decisions reaffirmed frequently by this and other courts, that a sale of a bankrupt's property does not moot a prior appeal challenging the trustee's right to sell.

The appeal by the landlord in Frasin was not moot even though the district court had specifically sanctioned the trustee's sale to the identified purchaser and had enjoined the lessor from claiming the right of re-entry, and even though the sale had been consummated. The purchaser's right to the property could not have been more explicit than it was in Frasin. Yet that right was subject to the pending appeal, and the right vanished upon reversal.

Similarly, in the instant proceedings, the Trustees' right to sell was, and still is, subject to this Court's determination. Doyle can hardly claim reliance on the July 29 vacatur and the conditional September 10 "sale" to urge mootness. The district court in Frasin issued a specific endorsement of the petitioner's "right" to purchase, and yet the appeal was not moot. Can there be mootness at bar, where, in contrast to Frasin, Judge Cannella made clear that his order for a new sale was subject to this appeal? The Bankruptcy Judge, the attorneys for the Trustees,

and the language of the contract itself all informed Doyle that he took at his risk only such title as the Trustees had. One can only speculate why Doyle took the risk. Perhaps he thought the speculation worth it because of the expected profits his retail store is now enjoying from the Christmas season, an expectation which Hancock used as a reason in opposing Dominick's August 13 motion to stay the District Court's order of remand (532a). Whatever the reason, the risk was Doyle's, and he may not eliminate it by seeking dismissal.

The District Court was wrong in vacating the confirmed sale to Dominick's, and this Court has the power to do something about it. It is as simple as that. The power has been clear since the early 1900's when this Court handed down Frasin and Burr.

POINT III. THE DOCTRINE OF FINALITY OF JUDICIAL SALES REQUIRES THE REVERSAL OF THE DISTRICT COURT'S VACATUR OF THE CONFIRMED SALE.

It is obvious that an order which sets aside a confirmed judicial sale on grounds as flimsy as those asserted here does damage to the "finality doctrine" which fosters spirited participation by prospective purchasers, assuring them that once the hammer falls, the sale is over. See Dominick's Brief, Point V.

It would be disastrous to the effective judicial administration of these sales if bidders were permitted, after the sale, to go home, reflect, consider their mistakes, and then have a second bite of the apple. Yet that is precisely what happened here. Hancock knew six days prior to May 17 that there would be another suitor for the property; and was told by the Trustees' attorney six days before the sale that a higher price by the other suitor "might take it away." (459a). At the hearing Hancock matched Dominick's bid of $675,000, but then withdrew his offer. Dominick's increased offer of $685,000 was accepted by Court. A contract was immediately executed between Dominick's and the Trustees and a large downpayment was made. Hancock went home, Doyle brooded, and a telegram was sent in the name of Hancock seeking leave to offer a slightly higher price -- 6% higher -- than Dominick's court-accepted offer. The Bankruptcy Judge properly refused to reopen the bidding.

The Appellees seek to avoid the finality doctrine by making two astounding mischaracterizations. First, they claim that the District Court vacated not a confirmed judicial sale, but merely reversed an order of confirmation (Trustees' Brief, pp. 31, 33; AMF's Brief, p.9). Appellees latch on to this alleged distinction -- inapplicable here - because they want this case considered as if it were one concerning an objection to confirmation raised prior to confirmation, rather than in the light of cases dealing with post-confirmation motions to vacate. The distinction just does not apply to this case, and even if it did, it would make no difference. Second, the Appellees claim that the bid of $1.2 million made after the District Court's vacatur shows that Dominick's purchase price was inadequate. The argument is without merit.

A. The District Court Vacated A Final Sale Which The Bankruptcy Court Had Confirmed Without Any Objection From Anyone.

The Appellees base their argument on the claim that they did not appeal an order of vacatur, but only on order of confirmation. The attempted distinction is ludicrous on the facts present here.

The record demonstrates that the District Court vacated a confirmed judicial sale. It could be no other way because neither Hancock nor AMF had made any attack prior to the order of confirmation.

The confirmation of sale to Dominick's occurred at the end of the May 17 hearing when Judge Ryan approved the Trustees' application and amended the hearing "to one to accept the offer made by [Dominick's]" (88a). Immediately thereafter, pursuant to the oral order of confirmation, the attorneys for Dominick's and the Trustees repaired to the offices of the Trustees' attorneys to close the contract of sale.

Judge Ryan at the June 28 hearing specifically stated that he had orally issued a final order at the May 17 hearing. In rejecting the argument that the sale was not final until entry of a written order, Judge Ryan said:

> "I read the decision by Judge Wyatt affirming Judge Galgay because Judge Galgay had said, 'Look, this sale is not final until I sign an order.' As opposed to that, I said to Mr. Hancock several times, giving him fair warning, and then I concluded the hearing. It was my intention that that sale be concluded then and there. In the Grant matter, Judge Galgay expressly made known that those sales were not to be complete until he made an order of confirmation. I am familiar with the problem in the Grant Stores case." (491a) (emphasis added).

Hancock himself acknowledged on May 17 that Judge Ryan had issued an order of confirmation earlier that day. Hancock's two telegrams of May 17 (90a, 641a) requested that "the court order of May 17, 1976 be vacated and the court consider the increased offer of John Hancock." (Emphasis added). The Appellees can hardly be heard now to suggest that there was

no confirmation until May 24. The decretal portion of the written order entered on May 24 authorized the Trustees "to consummate the sale" to Dominick's (91a). The recital portion of the order made it clear that Dominick's offer had been previously accepted.* The appeal from the May 24 written order was, therefore, in actuality, a post-confirmation challenge to the sale.

Where a protest to confirmation is not made at the hearing on confirmation, arguments available on direct challenges to the sale (such as on appeal from the confirmation order) are waived. See In re Kaminsky, 281 F. Supp. 676, 680 (E.D. Wis. 1968), aff'd 413 F.2d 954 (7th Cir. 1969); Jacobsohn v. Larkey, 245 F. 538 (3d Cir. 1917); In re Shamokin Lumber & Construction Co. 54 F. Supp 481 (M.D. Pa. 1944); see also 4A Collier, Bankruptcy ¶70.98[17] at 1186-1186.1, n.93 (14th ed. 1976); Dominick's Brief, Point II. The only arguments available concern alleged defects which are grave and shock the conscience.

*The validity of an oral confirmation order is supported by all the authority uncovered. See In re New Strand Theatre, Inc., 109 F. Supp. 350, 351-352 (S.D.N.Y. 1952), aff'd on opinion below, 201 F.2d 889 (2d Cir.), cert. denied, 345 U.S. 995 (1953) (indicating that an oral order of confirmation of sale is valid and binding where the bankruptcy court's explicit oral confirmation is followed by a signed confirmation); 4A Collier, Bankruptcy ¶70.98 [17] at 1181, n.88 (14th ed 1976).

This Court can search the entire Record of the May 17 hearing (77a-89a) and the May 17 telegrams (90a, 641a) and will find no protest of any kind by Hancock or anyone else. There was no protest to Dominick's presence; no objection to the notice of hearing; no preservation of rights - absolutely nothing!

Even assuming that there was no formal confirmation until the written May 24 order, the Appellees are still at a loss to point to any direct attack on the confirmation prior to May 24. Clearly, Hancock's telegram, offering a new bid 6% higher than Dominick's purchase price did not even suggest a protest to Dominick's participation in the confirmation hearing or to the confirmation of the sale. Hancock's offer was at best a bid received after bidding was officially closed, and by itself indicated no basis for reopening the proceeding. E.g., In re Shamokin Lumber & Construction Co., 54 F.Supp. 481 (M.D.Pa. 1944). Cf. In re Gil-Bern Industries, Inc., 526 F. 2d 627, 629 (1st Cir. 1975) (citing authority for "established rule that it is an abuse of discretion for a bankruptcy court to refuse to confirm an adequate bid received in a properly and fairly conducted sale merely because a slightly higher offer has been received after the bidding is closed.")

In an attempt to cure the barren record, Hancock and AMF moved to vacate the order of confirmation on June 10 in order to make a record. The protest came too late. See Dominick's Brief, Point II.

The Appellees' attempt to characterize the appeal to Judge Cannella as being from an order of confirmation is sheer legal gimmickry, and raises form over substance.* That appeal was empty; devoid of substance. The entire argument before Judge Cannella and all the briefs submitted there and here by the Appellees are based almost 100% on the June 28 hearing before Judge Ryan on the motion to vacate. The District Court held that "the sale be set aside" (12a) and relied upon testimony at the June 28 hearing to reach its decision (13a, 14a). There was absolutely no doubt that, in so holding, the District Court had consolidated both the empty appeal from the May 24 order with the appeal, based upon a full record, from Judge Ryan's June 28 oral denial of Hancock's motion to set aside the sale. Indeed, AMF specifically acknowledged that the District Court had so informed the parties of this procedural posture in AMF's letter to the District Court (528).**

The rule which requires a bankruptcy court to refuse to reopen bidding after a sale has been confirmed merely because a slightly higher offer has been received after the close of

* Hancock attempted to restrict his appeal from Judge Ryan's denial of the motion to vacate by formally appealing only from Judge Ryan's June 10 denial of a temporary restraining order precluding Dominick's from transferring the property pending the June 28 hearing of Hancock's "motion to vacate and set aside" the May 24 order (137a). Of course, the assumption underlying the need for such a restraining order could only be that Dominick's could transfer the title to the property because he had bought it at the May 17 hearing.

**AMF's attorney wrote: "We have been advised by Mr. Danilow [Judge Cannella's law clerk] that the Court is consolidating the appeal from the confirmation of the sale . . . with the appeal from the denial of a motion to set aside the sale . . . and expediting both." (528a).

bidding, In re Shamokin Lumber & Construction Co., supra, was recognized in In re Burr Mfg. & Supply Co., 217 F. 16, 20 (2d Cir. 1914), which was reaffirmed in In re General Insecticide Co., 403 F.2d 629(2d Cir. 1968), the case upon which the Appellees rely so heavily for avoiding the strict standard applied to vacating a sale (Hancock's Brief, p.33; Trustees' Brief, pp. 26, 33, 37; AMF's Brief, pp. 5-10).

In General Insecticide, this Court affirmed the District Court's refusal to vacate a judicial sale. The facts were that machines having an appraised value of $550 were sold for $380, or 69% of appraised value. None of the creditors received notice of the proposed sale. The creditors, therefore, did not raise any objections at the confirmation hearing, and because they had no notice of the hearing, no appeal was taken from the confirmation. The creditors were forced to seek relief by petitioning the referee to vacate the sale. They were unsuccessful both before the referee and before the District Court on appeal. 403 F.2d at 630. This Court affirmed the District Court, holding that failure to receive the notice did not relieve the creditors of their failure to make a timely protest. "It is incumbent upon creditors to follow the record ... and discover for themselves orders which they may want to challenge."* Id.

This Court stated:**

"The standard for setting aside a sale is stricter

* Thus, the Trustees' interpretation of General Insecticide as requiring notice to creditors in the instant case is expressly contradicted (Trustees' Brief, p.37, footnote).

** Appellees conveniently cited only that part of the Court's statement which they apparently believed must be supportive of their theory.

> than that applied in a direct attack on confirmation. In the latter, the governing principle is to obtain the best price for the bankruptcy estate whereas in the former there is a greater emphasis upon finality in judicial sales and executed contracts unless they are 'tinged with fraud, error or similar defects which would in equity affect the validity of any private transaction.' 4A Collier, Bankruptcy, ¶70.98[16], 1183, 118494 (14th ed. 1967); In re Burr Mfg. & Supply Co., 217 F. 16, 19 (2d Cir. 1914)." 403 F.2d at 630-631 (emphasis added).*

General Insecticide, therefore, merely applies the well-established rule recognized in In re Burr and by the cited commentary that an objectant to a confirmation must make "a direct attack on confirmation" before the bankruptcy court or be relegated to the "stricter" standard of setting aside a judicial sale.** Where, as here, there is no direct attack prior to confirmation and the sale takes place and the contract of sale is "executed", 403 F.2d at 631, as occurred at bar immediately after the close of the May 17 hearing (231a-232a), "there is greater emphasis upon finality in judicial sales and executed contracts." See also In re Strunks Lane & Jellico Mountain Coal & Coke Co., 64 F. Supp. 731, 733 (E.D. Ky. 1946).

* The Court also noted, as it explained in the rule quoted above, and relied upon by Appellees, that had the creditors made a direct attack upon the confirmation which was denied by the lower courts, and appealed such denial, the Second Circuit would have "probably reversed the judgment below" 403 F.2d at 630, because "there was no justification for a private sale" on the facts before it, Id., and probably also because the sale price was only 69% of the appraised value. 403 F.2d at 631.

** In re Burr, emphasizes the obvious principle that once the sale is confirmed, a party aggrieved may not seek the lower standard for an attack on confirmation simply by making a post-confirmation attack on the order. In Burr, as in the instant case, the objectant asked for both a resale and that the confirmation of sale be vacated. This Court, of course, treated the relief sought as the vacatur of a confirmed sale.

If the Appellees had their way, the doctrine of finality of judicial sales would be in shambles, for a participant in a sale who made no protest thereat would be permitted after the sale to raise issues on appeal never raised below. This Court should recognize the Appellees' argument as being totally destructive of important considerations of judicial policy and administration.

B. The District Court Should Not Have Reversed The Bankruptcy Court Even Assuming Arguendo the Appellees' Standard of Review of An Order of Confirmation.

Dominick's bid, as a matter of law, was more than adequate. Moreover, Appellees have established no other error.

1. Dominick's Purchase Price Was More Than Adequate As A Matter of Law.

The law is clear that Hancock's midnight telegram which offered a 6% increase over Dominick's purchase price fell far short of supplying the type of "extraordinary showing to justify the refusal to confirm." 4A Collier, Bankruptcy ¶70.98[17] at 1181; accord, In re Gil-Bern, 526 F.2d 627, 628-629 (1st Cir. 1975); Knight v. Wertheim & Co., 158 F.2d 838, 843 (2d Cir. 1946) ("[E]xcept upon the extremest provocation, courts will not upset a judicial sale at auction, upon the ground that a new bidder has appeared who offers more than the

knock-down price.") Dominick's purchase price surpassed the appraised value of the property* and Hancock's 6% increased bid was insufficient.**

Principles of judicial finality preclude a bankruptcy judge from refusing to confirm a sale where the percentage of the increased offer is as small as here. E.g., In re Gil-Bern, 526 F.2d 627, 628-629 (1st Cir. 1975) (indicating a 3% increase in post-bid offer far too insubstantial to refuse confirmation); In re Stanley Engineering Corporation, 164 F.2d 316, 318-319 (3d Cir. 1947), cert. denied, 322 U.S. 847 (1948) (reversing bankruptcy court's refusal to confirm sale to high bidder where subsequent offer was 17-1/2% higher than highest bid and 14-1/2% over the appraised value); In re F. P. Newport Corp., 123 F.Supp. 95, 98 (S.D. Cal.), appeal dismissed, F. P. Newport Corporation v. Sampsell, 216, F.2d 344 (9th Cir. 1954), cert. denied, 348 U.S. 972 (1955); In Re Metallic Specialty Mfg. Co., 193 F. 300 (E.D.Pa. 1912) (bid of $17,000 confirmed in preference to promised bid of $20,000 at a future sale); see generally, 4A Collier, Bankruptcy ¶70.98 at 1190-92.

The adequacy of the Dominick's bid of $685,000 is forcefully brought home by the Hancock's own statement of the facts concerning his bid of $650,000. Hancock states:

* Compare, Blossom v. The Milwaukee & Chicago Railroad Co., 70 U.S. 196 (1866); E.H. Coulter v. Blieden, 104 F.2d 29 (8th Cir. 1939), cert. denied, 308 U.S. 583 (1939); Century Motor Truck Co. v. Noyes, 18 F.2d 546 (1st Cir. 1927).

** Compare, Reid v. King, 157 F.2d 868 (4th Cir. 1946).

> "The notice of the availability of the Property had been widely circulated by the Trustees. Mr. Yassky, an attorney for the Trustees stated, 'it can be fairly said that any interested party in the entire Chicago area was aware this Property was for sale.' ... Several other prospective sales had previously collapsed during the two year vacancy of the Property. ... The Trustees were delighted with the negotiated contract [with Hancock] since it provided for payment of $650,000, the exact independent appraisal value and would put an end to further negotiations and false starts with respect to this dormant property." (Hancock's Brief, p.2).

If the $650,000 was adequate, surely the Dominick's bid of $685,000 was adequate.

The District Court therefore abused its appellate authority when it reversed the Bankruptcy Court on the speculation that a new sale would increase the size of the estate (13a, 15a; see Dominick's Brief, Point IV). "It seems hardly open to question that adequacy of consideration must be determined as of the time the sale is confirmed." (Emphasis supplied). 4A Collier, Bankruptcy ¶70.98[17] at 1190, n.3. Events subsequent to confirmation are not to be considered. E.g., Smith v. Juhan, 311 F.2d 670, 673 (10th Cir. 1962); In re Marathon Foundry & Machine Co., 228 F.2d 594, 598 (7th Cir.), cert. denied, 350 U.S. 1014 (1956). Contrary to the Appellees' unsupported assertions (AMF's Brief p. 6; Hancock's Brief, p.40), Judge Ryan was well aware of the creditors' interests. Under the circumstances the doctrine of judicial finality was controlling. In re Gil-Bern, 526 F.2d 627, 628-29 (1st Cir. 1975); Knight v. Wertheim & Co., 158 F.2d 838, 843 (2d Cir. 1946).

2. The Appellees Have Pointed To No Irregularities In The Proceeding Or In The Notice Of The May 17 Hearing Or To Any Case Which Indicates That The Order Of Confirmation Should Be Vacated.

The Appellees' attempts to dilute the holding of Judge Learned Hand in Freehill v. Greenfeld, 204 F.2d 907 (2d Cir. 1953) that a would-be contract purchaser of a debtor's property is charged with knowledge of possible bidding by others, must be rejected out of hand as totally without basis in the opinion and contradictory to case law on judicial finality. (Hancock's Brief, p.36; AMF's Brief, pp.16-17; Trustee's Brief, p.46).

The Appellees' only other attempt at a legal argument is their reading of Bankruptcy Rule 10-209(b) (Hancock's Brief, p.36; AMF's Brief, p.15) which provides that a notice of a proposed sale of property "is sufficient if it generally describes the property to be sold." The Rule reflects the general flexibility and discretion which the Chapter X and Chapter XI notice rules accord the Bankruptcy Judge. The Bankruptcy Judge need put in the notice only that information which in his opinion adds to the efficient administration of the estate. See Dominick's Brief, pp.22, 44-47. As such it reflects the Freehill rule which charges a prospective purchaser with knowledge of potential bidding.

Unable to offer persuasive reasons for this Court to overturn its established law, the Appellees distort the facts concerning Hancock's actual notice of probable bidding. The Appellees' distortions are so numerous, that only a few can be

listed here by way of illustration. Thus, the Trustees' description of their representatives' communications with Hancock and his lawyer is misleading. (Trustees' Brief, pp.5-6) The Trustees for instance, fail to inform this Court that Mr. Rotkin, one of the Trustees' attorneys, swore by affidavit (224a) and testified that he had informed Hancock's attorney by telephone no later than May 12 that another party [Dominick's] might come into Court on May 17 and "offer more and might take it [the property] away." (458a-459a) i.e., that another party might make "a higher bid." (224a). Neither do the Trustees mention that on May 11, six days before the sale, the Debtor's director of Real Estate apprised Hancock directly of another bidder's interest, "that if a higher bid was offered he could lose the property," (226a) and that Court approval of the contract would be a problem if "someone else bid a higher price." (227a). Mr. Finklestein repeated the substance of this exchange at the June 28 hearing (444a, 449a-451a).* See generally Dominick's Brief, pp.8-9, 10-13, discussing fully the facts of Hancock's actual notice of probable bidding.

Similarly, Hancock's rendition of the facts falls far short of accuracy. (Hancock's Brief, pp.4-9, 35). Hancock's testimony that the Trustees' representatives assured him there would be no bidding was hardly "uncontroverted" (Hancock's Brief, p.5), as demonstrated by the excerpts from the Record referred to in the preceding paragraph. Further, Hancock's statement that

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* Compare, the Trustees' July 6, 1976 letter to the District Court arguing that Hancock did in fact have sufficient notice (523a-525a).

Mr. Finklestein, on May 11, mentioned nothing more than the possibility of objections to price at the hearing is wholly incorrect -- Mr. Finklestein not only warned that the May 17 hearing "would be a bidding situation," he even offered to appear in Court himself, if Hancock was unable to appear, and to enter bids for Hancock (450a-451a).

Although the Appellees would like this Court to rely on Hancock's testimony that he had no notice of bidding, the Bankruptcy Court found Hancock to be less than credible (434a-436a, 440a-441a, 445a, 480a), and chose to rely on the testimony of the Trustees' representatives (478a, 495a). The District Court ignored the Bankruptcy Court's finding on Hancock's actual notice.

Unable to skirt Hancock's actual notice of the bidding, the Appellees fall back to arguing that the notice did not meet the provisions of 10-209(b)(4), and therefore that the creditors were somehow prejudiced. These characterizations of the facts and the law are flatly wrong. The record offers no support that either a wider distribution of the notices or a full 20-day period of notice would have resulted in more bidders. The fact that no additional bidders appeared on September 10 evidences the soundness of Judge Ryan's findings based on the Trustees' statements that since the property had lain vacant for two years, it was a fair presumption that "any interested party in the entire Chicago area was aware that this property was for sale." (478a).

Similarly, Appellees wrongfully rely on the Notice requirements of Section 58(a) of the Bankruptcy Act (11 U.S.C. § 94), and cases interpreting that section, to attack the notice

procedure (Hancock's Brief, pp.43-44, 47; AMF's Brief, pp.11-12). That section is simply "inapplicable" under [Chapter X]." 6 Collier, Bankruptcy, ¶3.39[1] at 688-689, n.4. (14th ed. 1972), and Rule 10-209(b) has superseded Section 58(a). See Comment to Bankruptcy Rule 10-209. Indeed, the entire statutory framework for notice under Chapter X and XI is directed to maximizing the Bankruptcy Judge's authority and flexibility to fix the terms of notice.* See, generally, 6 Collier, Bankruptcy §3.39[1]; Dominick's Brief, pp.44-46. Thus, it is not surprising that the District Court's referral order to Judge Ryan of all matters in the Interstate Chapter X proceedings explicitly left to Judge Ryan all matters pertaining to notice (586a).

The Appellees also ask this Court to uphold the District Court's vacatur because Judge Ryan did not make advance findings of the "cause shown" for shortening the notice period and for sending notice to a limited number of creditors, findings which the Appellees allege are technically required by Rule 10-209(b)(4) (Hancock's Brief, pp.46-47; Trustees' Brief, pp.38-43, AMF's Brief, pp.13-14).**

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* Even under the stricter requirements of Section 58(a), a reason for modifying notice is, as Judge Ryan found (488a, see also 465a), that the property could have been "appreciably reduced in value by the administrative costs entailed in giving notice." In re General Insecticide Co., 403 F.2d 629, 631 (2d Cir. 1968).

** Apparently the Appellees concede that cause was shown for the notice at the June 28 hearing but contend that these findings were too late. The Trustees, however, make the outrageous assertion that Judge Ryan made no statement of "his findings in support

(Cont'd on next page)

The Appellees' argument is without merit. The only case law on this issue stands for proposition that advance findings are not necessary under the circumstances here. See Cameron v. Roemelmeyer, 389 F.2d 599, 601 (5th Cir. 1968); In re L. M. Axel Co., 3 F.2d 581, 582 (6th Cir. 1925); see Dominick's Brief, Point III B. Cause was shown for limited notice not only at the June 28 hearing where findings were made, but also at the time the notice was sent. The record of the Interstate Chapter X proceedings made it abundantly clear to all interested creditors and shareholders that 17,000 notices were impractical.

There simply is no basis for the Appellees' claims of irregularities. The truth was set forth by the Trustees below, prior to the events of September 10, where they wrote to Judge Cannella (523a-525a) stating that Hancock had one week's actual notice of another bidder; and defending in detail the substance of the notice and the shortened period of notice.

(Cont'd from previous page)

of a restriction of the persons to receive notice . . . . " Trustees' Brief, p.41. In fact, Judge Ryan did articulate such findings characterizing the instant notice as the one:

> "[T]hat goes out to the persons who have participated meaningfully in the reorganization proceedings to date. It would be an absurdity to send out 9000 notices every time anything of importance was to take place in the estate. The notice was entirely proper." (448a) (quoted in Dominick's Brief, p.14).

CONCLUSION

The motion to dismiss should be denied, and the District Court order of July 19 should be reversed in its entirety.

Dated: New York, New York
December 10, 1976

Respectfully submitted,

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Due and timely service of two copies of the within Brief is hereby admitted this 10th day of December 1976.

.....
Attorneys for Appellee.

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Attys. For
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